

FINAL STATEMENT OF REASONS

The Initial Statement of Reasons (ISOR) is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS

On August 1, 2014 the Notice of Proposed Regulations for “Urinalysis Testing Program for Parolees” was published which began the public comment period. The Department’s Notice of Change to Regulations #14-08 was also mailed the same day to individuals who had requested to be on the Department’s mailing list for regulation changes. In addition they were posted on the California Department of Corrections and Rehabilitation (CDCR) internet and intranet websites, and copies posted in CDCR institutions. The Department received two written comments which are included below under *Summaries and Responses to the Written Public Comments Received During the Initial Comment Period*. A public hearing was held on September 24, 2014 with no individuals providing verbal comments.

After publication of the Notice of Proposed Regulations, it was determined that additional changes were necessary. The CDCR Form 2249, Urinalysis Sample Control Log, was revised for better accuracy; and two other minor language changes were needed for correction purposes.

The changes were presented to the public by issuance of a 15-Day Re-notice, and an effective comment period from October 15, 2014 to October 30, 2014. The 15-Day Re-notice was posted to the CDCR internet and intranet websites, and mailed to the two written commenters. The changes to the text and the reasons for them can be found below under the heading *Changes to the Proposed Text of Regulations (15-Day Re-notice)*. There were no commenters during the 15-Day Re-notice period.

After issuance of the 15-Day Re-notice, due to the adoption of the Security Threat Group regulations on October 17, 2014, a change was made to Section 3545(c)(4) for correction purposes, which re-named the word “Gang” member to “STG-I” member. This change is reflected in the final text for these “Urinalysis Testing Program for Parolees” regulations.

The following statement was inadvertently left out of the ISOR, but should have been included:

Significant Adverse Economic Impact on Business

The Department has made an initial determination that the proposed regulations for the Urinalysis Testing Program for Parolees will not have a significant adverse impact on business in the State of California because these regulations apply to urinalysis testing of parolees, and any impact to businesses for less laboratory testing would be offset by the procuring from those same businesses of instant test kits. Therefore, no significant adverse economic impact on business exists.

DETERMINATION

The Department has determined that no alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. This determination was reached by a consensus of the Division of Adult Parole Operations.

CHANGES TO THE TEXT OF PROPOSED REGULATIONS (15-DAY RE-NOTICE)

Subsection 3620(a) was amended to replace the wording “reasonable belief” with “reasonable suspicion” to provide consistency with the Department’s already established definition.

Subsection 3621(a)(2) was amended to reflect the revision date of CDCR Form 2249; the date of “(06/12)” has been deleted and replaced with “(REV. 08/14).”

Subsection 3622(a)(1) was amended to reflect the revision date of CDCR Form 2249; the date of “(06/12)” has been deleted and replaced with “(REV. 08/14).”

Subsection 3622(a)(4) was amended to correct language regarding processing of the CDCR Form 2249, as the form is not processed by the Unit Supervisor, but rather placed in the parolee field book or parole Field File.

INCORPORATED BY REFERENCE

The CDCR Forms 2249, 2250, 1527, and 1650-D were made available to the public throughout the rulemaking, and will continue to be made available upon request. To publish these documents into the California Code of Regulations would be cumbersome and impractical, and would increase costs to the Department.

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

SUMMARIES AND RESPONSES TO THE WRITTEN PUBLIC COMMENTS RECEIVED DURING THE INITIAL COMMENT PERIOD

Commenter #1

Comment 1A: Commenter feels providing instant test kits/on-site testing is a great idea, however, there must be some protocol as to deciphering between prescription drugs and illegal drugs. Commenter states inmates at CSP Solano are being written up when their results are “dirty” whether the results are from drugs prescribed by the inmate’s physician or illegal drugs. Commenter states it would be a shame if parolees had their parole revoked because CDCR did not come up with a procedure to deal with positive urine tests due to an inmate taking a

prescription drug. In addition this would cause the use of more time and effort from parole officers by having to write up more reports and arrest the parolees. The recidivism statistics would be incorrect because innocent parolees will be violated. It would also take months for the parolees to appeal the decision.

Accommodation: None

Response 1A: Section 3620(b) specifies the process for addressing parolees taking prescription or over-the-counter medications which may result in a positive UA test result.

Commenter #2

Comment 2A: Commenter challenges the statement in the Initial Statement of Reasons (ISOR), that states the “instant test kit provides accurate, fast, results.” Commenter asks by whose estimation are the results accurate, and to what standard is the alleged accuracy held? Commenter states the Department offers no evidentiary support for this statement.

Accommodation: None

Response 2A: The Department utilizes a legally-defensible on-site drug test device with Gas Chromatography/Mass Spectrometry (GC/MS) confirmation which is certified by Substance Abuse and Mental Health Services Administration (SAMHSA). The fully integrated on-site drug test device offers instant drug screening results with the scientific and legal certainty of traditional laboratory procedures.

Comment 2B: In regards to storage of urinalysis (UA) samples, Commenter states no length of time is suggested for this storage, nor the conditions under which the samples will be maintained, again leaving no specific information as to whether this process meets industry standards, or whether industry standards have been considered.

Accommodation: None

Response 2B: The chain of custody requires that the specimen be taken by an authorized person utilizing proper procedures for maintaining security. The urine shall be stored at room temperature within a locked storage container protecting the samples from direct light exposure. The individual parole units have the ability to schedule courier pick-up based on need, not to exceed 72 hours. All of this is in consideration of the industry standards.

Comment 2C: Commenter asks about the purity of the sample, and asks “Given that the same sample produced the alleged positive result, is this same sample not contaminated? Additionally, any substance that could produce a false positive result would continue to be present in the existing sample.”

Accommodation: None

Response 2C: If the sample produces a positive result, it does not contaminate the sample. There are no additives combined with the sample following the results. The GC/MS confirmation identifies individual drugs or metabolites in a urine sample, eliminating the concern for a false positive. Additionally, the fully integrated on-site drug test device is designed to keep the active component of the device safe from tampering.

Comment 2D: Commenter states “no cost figures” were given to compare the savings vs. cost differentials for less laboratory costs vs. costs for procuring the instant test kits, thus depriving citizens of information needed to realistically compare costs and economic impact. Commenter mentions that if UA testing is trending downward due to the on-going decrease in overall parolee population, as the ISOR states, costs should be a minor factor in the consideration.

Accommodation: None

Response 2D: During the pilot program, and as stated in the ISOR, it was determined that any costs would be offset by the savings. Aside from an economic impact, a key component of the Urinalysis (UA) Program is to promote honesty and build rapport between parole agents and the individuals under their supervision to assist in successful reintegration. The increased honesty promotes voluntary admission in lieu of providing a drug test. Voluntary admissions reduce the use of the on-site test cups and subsequent laboratory testing, as well as afford the parole agents the ability to provide immediate programming options as an alternative to custody. This provides for optimal efficiency in producing the desired results for the State, and long term recovery from addiction for parolees.

Comment 2E: In the ISOR section “Materials Relied Upon,” Commenter takes issue that the Department states it “... has not relied upon any technical, theoretical, or empirical study, report, or similar document.” Commenter states citizens as well as parolees are entitled to know from where these proposed changes were promulgated and under what guidelines they were created and thus supported. Commenter adds, that it appears that, having admitted to having relied on no factual or empirical evidence of the need for these changes, the Department is simply ‘winging it,’ making up changes and reasons to fit the wishes of itself.

Accommodation: None

Response 2E: The Department disagrees with Commenter. While no materials were relied upon in drafting the proposed regulations, the Department did research current industry standards/best practices, and review related reports prior to implementing the pilot program which proved a successful endeavor. The experience gained from the pilot program that was done in selected counties under the authorization of Penal Code 5058.1, showed a 19% reduction in positive UA test results from June 2013 to August 2013, and a 56% increase in referrals for treatment programming in lieu of incarceration. Finally, the pilot sites realized a reduction of cases referred for parole revocation of 88%.

Comment 2F: Commenter states that by not considering information from experts in the field, the Department fails to provide information to the public/parolees on the rate of “false-positives,” and what measures can be done to improve the problem. In addition, there is no

specific language in the proposed regulations for allowed medication, which can produce positive test results. Commenter states there may be as many as 250 over-the-counter (OTC) medications that can produce positive UA test results for substances such as codeine, morphine, and marijuana. Such common OTC remedies as ibuprofen, cough and cold remedies, allergy, and asthma medications have been verified as producing false positive results. The proposed regulations fail to address in any way what provisions the Department has considered for instances where non-prescription, legal OTC drugs may produce false-positive results. Additionally there are medical conditions such as kidney, liver disease, and diabetes, which can create a false positive UA test result. Commenter feels this can open the door for abuse of discretion by the Parole Agent. Parolees may be subject to sanctions for positive UAs and have no recourse under the provisions of the proposed regulatory change.

Accommodation: None

Response 2F: GC/MS testing identifies individual drugs or metabolites in a urine sample. In some cases, initial screening drug tests may cause false positives (infrequently); however, GC/MS testing greatly reduces this occurrence making the risk close to zero. See also, Response to Comment 1A.

Comment 2G: In Section 3620(a) which states “If reasonable belief exists that a prohibited substance was recently used, the CDCR Form 1515 Addendum is not required for the PA to instruct the parolee to provide a UA specimen for testing” Commenter states the statement and section fails to establish what constitutes ‘reasonable belief,’ and by whom this belief is to be held, or in what manner this belief is to be documented. Such lax language leaves open the possibility for abuse of discretion by Parole Agents and/or ‘confidential informants’ who may have ulterior motives for believing an individual is engaging in prohibited behavior.

Accommodation: None

Response 2G: Reasonable belief is a subjective standard used to validate warrantless searches and seizure. With that, if an officer acts on personal knowledge of facts and circumstances which are reasonably trustworthy, then reasonable belief exists. For example, if the parolee displays the objective signs and symptoms of being under the influence of a controlled substance, and/or admits to the use of either one, then the parole agent may conduct a drug test. Note: As noted in the 15-Day Re-notice, the language “reasonable belief” was changed to “reasonable suspicion” to be consistent with existing policy definitions, however both terms have the same definition.

Comment 2H: In regards to Section 3620(b), regarding prescribed medication, language states the PA instruct the parolee to provide “proof of the current and valid prescription” but Commenter states it fails to provide clarity on what the ‘proof’ must consist of (script from doctor, verification from pharmacy, pill bottle, etc.) and further does not define ‘current.’

Accommodation: None

Response 2H: A current valid prescription may be the prescription from the licensed physician, verification from the pharmacy, or the prescription bottle label. Any of these provide as proof for the “current” time period in question.

Comment 2I: Commenter states that by nature of their relationship, Parole Agents are inherently intimidating, and for a parolee to refuse to sign the Form 1527, Statement of Admission, could put them at greater risk for retaliation or harassment, and ultimately result in more severe sanctions for minor infractions.

Accommodation: None

Response 2I: The CDCR Form 1527 affords parolees the ability to admit to the use of alcohol and/or controlled substances in lieu of drug testing, as well as after the positive on-site drug test result prior to laboratory confirmation. This allows for the parolee to have the ability to immediately engage in programming options to address their criminogenic needs.